Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

DOMINIC BARAGONA, *et al.*,

Petitioners,

v.

KUWAIT GULF LINK TRANSPORT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does allowing a defendant, who had notice and an opportunity to contest personal jurisdiction, to subsequently challenge personal jurisdiction and vacate a default judgment under Fed. R. Civ. P. 60(b)(4) perpetuate the disarray among the lower courts regarding their unjustifiably inconsistent treatment of judgments pursuant to Fed. R. Civ. P. 60(b)(4), resulting from a misinterpretation of this Court's dicta, in contravention of important federal judicial policies?

2. Does Fed. R. Civ. P. 60(b)(4) create an exception to the waiver provisions of Fed. R. Civ. P. 12(h) for a defaulted defendant?

PARTIES TO THE PROCEEDING

Petitioners Dominic and Vilma Baragona, citizens of the United States and Florida, lost their son Lieutenant-Colonel Dominic Baragona as a result of the negligence of the driver of a tractor trailer truck owned by Kuwaiti Gulf Link Transport Company on May 19, 2003. Petitioners bring this action in their individual capacity as parents, and by Dominic Baragona as administrator of the estate.

Respondent Kuwaiti Gulf Link Transport Company is a Kuwaiti corporation, organized under the laws of Kuwait, which held contracts with the U.S. government at the time of the accident.

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Sup. Ct. R. 10(c) 8

Petitioner Dominic Baragona respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on January 21, 2010.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Eleventh Circuit (Edmondson, Birch, Kravitch, opinion per curiam) is reported at 594 F.3d 852, and is reprinted in the Appendix hereto at 1a.

The Memorandum Opinion of the United States District Court for the Northern District of Georgia (William S. Duffey, Jr.) is unpublished, and is reprinted in the Appendix hereto at 8a.

The Order of the United States District Court for the Northern District of Georgia (William S. Duffey, Jr.) finding personal jurisdiction over the defendant is unpublished, and is reprinted in the Appendix hereto at 50a.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2010. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule Civil Procedure 12(h):

. . .

(h) Waiving and Preserving Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

Federal Rule Civil Procedure 60(b)(4):

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

. . .

(4) the judgment is void;

. . .

STATEMENT OF THE CASE

On May 19, 2003 Lieutenant-Colonel Dominic Baragona, Petitioner Dominic and Vilma Baragonas' ("Baragona" or "Petitioner") son, died in a tragic and senseless traffic accident in Iraq near the Kuwaiti border. Kuwait Gulf Link Transport Company ("KGL"), a U.S. government contractor, employed the driver whose negligence was found by the U.S. Army to have killed Lieutenant-Colonel Dominic Baragona. Petitioner filed suit in the United States District Court for the Northern District of Georgia and invoked the jurisdiction of the District Court under 28 U.S.C. § 1332 because of diversity of citizenship, Petitioner being a resident of Florida and the Respondent being a resident of Kuwait.

Petitioner served the Complaint on KGL twice: directly by the Clerk of the Court by international courier on March 20, 2006 with a required-return-receipt, a protocol directed by the Court, R-4, and secondly through the Kuwaiti Ministry of Justice under the under the Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters on July 11, 2006. R-17. According to a July 11, 2006 letter, KGL subsequently retained Crowell & Moring, a Washington, D.C. government contracts law firm, to represent it in its proceedings with the U.S. Department of the Army Legal Services Agency, Procurement Fraud Branch, which also arose out of Colonel Baragona's death. R-105. Subsequently, upon Petitioner' motions for default and by order of the District Court, the Clerk of Court entered two defaults against KGL for its failure to appear or otherwise

answer after service of the Complaint on August 21, 2006 and January 10, 2007. The District Court then scheduled and conducted a hearing in this case on January 30, 2007.

At the hearing, the District Court directed Petitioner to prepare a memorandum of law on issues related to personal jurisdiction. The District Court ordered Petitioner to serve this document on KGL in Kuwait and its counsel in the United States. R-20. Petitioner prepared the memorandum, served it on KGL and its counsel in the United States as requested by the Court. KGL failed to respond or appear to contest the issue of personal jurisdiction, and on April 9, 2007 the District Court ruled "Plaintiffs submitted an affidavit setting forth a number of contacts between Defendants and the state of Georgia . . . . Plaintiffs have shown a prima facie case that the Court has personal jurisdiction over the Defendants in this case." R-24 at p.2. In this Order the District Court noted the "considerable effort to serve Kuwait Gulf Link Transport Company, a Kuwaiti entity notice of this lawsuit" expended by Plaintiffs. R-24 at p.2 n.1. The District Court also noted that KGL was represented in a collateral proceeding, that Petitioner had served KGL with their memorandum regarding jurisdiction on KGL's counsel and KGL itself and that KGL had not answered the memorandum of law regarding personal jurisdiction. R-24 at p.2 n.1.

The District Court then held a hearing on damages on April 25, 2007. Several months later, the District Court awarded $4,907,048 to Petitioner in compensatory damages against KGL on November 5, 2007. R-37. As a result of that final judgment, the Department of Army

Procurement Fraud Branch sent a letter to the Director of Legal Affairs for KGL requesting "information regarding the manner in which it intends to satisfy the judgment against it."

After monitoring the case through counsel in the United States for at least a year and a half and ignoring the notice required to be served by the Court of the adjudication of the issue of personal jurisdiction, KGL finally entered the case by filing a Motion to Vacate the Final Judgment, on February 15, 2008 over four months after the entry of final judgment, by arguing that KGL has insufficient contacts with the forum to allow for the assertion of personal jurisdiction over KGL. Petitioner responded by filing a Motion to Require a Bond, an opposition to KGL's motion to vacate and moved for jurisdictional discovery on March 21 2008. R-49, 51. On June 18, 2008 the District Court deferred ruling on the motion to vacate and granted Petitioner's request for a Bond finding that "KGL's conduct in this matter has been somewhat troubling, evasive and disruptive to the Court's consideration of a significant jurisdictional issue." R-57 at p. 20.

On December 5, 2008, the Court held an evidentiary hearing on the subject of personal jurisdiction. The Court required the parties to each simultaneously file a 20 page brief on KGL's personal jurisdiction contacts with the forum by January 2, 2008. The Court thereafter vacated the default judgment against KGL as a result of its finding that KGL did not waive its right to raise the defense of personal jurisdiction in its Fed. R. Civ. P. 60(b)(4) motion and that personal jurisdiction could not be asserted over KGL by the District Court. R-114 at p.33, 43.

Petitioner filed a timely appeal at the Eleventh Circuit Court of Appeal for the United States, which affirmed the opinion below in a per curiam opinion on January 21, 2010. The Eleventh Circuit held that:

> A defendant normally only waives a personal jurisdiction defense if he or she has entered an appearance or was involved in overt wrongdoing to deceive the court and avoid service of process. *Sanderford v. Prudential Ins. Co.*, 902 F.2d 897, 899 (11th Cir. 1990). In this case, however, none of these circumstances are present and "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ir. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). This is particularly true in this case where the court must determine whether the constitutional requirements of minimum contacts are satisfied. *See Foster v. Arletty 3 Sarl*, 278 F.3d 409, 413 (4th Cir. 2002) (holding that the defendant, a French company, did not waive its personal jurisdiction defense merely because it was served with process and had notice of the district court proceedings).

Baragona v. Kuwait Gulf Link Transp. Co., 594 F.3d 852, 854 (11th Cir. 2010).

REASONS FOR GRANTING THE PETITION

Review by this Court is necessary to correct the judgment below, which calls for an exercise of this Court's supervisory powers. Sup. Ct. R. 10(a), 10(c). This case involves important questions of federal law that have not been, but should be, settled by this Court. While the majority of lower court authorities are in accord with the decision of the court of appeals below, there are conflicts and inconsistencies within the existing authorities on matters that are important to the effective operation of the federal civil procedural system. Furthermore, much of the confusion in the lower courts appears attributable to a misinterpretation of prior dicta from the decisions of this Court. Accordingly, this Court should act to clarify this important area of federal practice and procedure.

The past patterns of decision in the lower courts however indicate that a summary vacatur and remand may be insufficient to give appropriate guidance. Accordingly, this Court should grant certiorari and set this case for briefing and argument on the merits.

I. Review by this Court is necessary to dispel the confusion among the lower courts as to the distinction between an erroneous judgment and a void judgment in the context of Fed. R. Civ. P. 60(b)(4)

The decision below follows a line of cases that does not allow a Federal Rule 60(b)(4) challenge to a judgment with findings on subject matter jurisdiction, even if erroneous absent a "total want of jurisdiction", but

requires that a district court re-examine a judgment with findings on personal jurisdiction when challenged by Federal Rule 60(b)(4) motion. The inconsistent treatment of final judgments found in these cases is traceable to the dicta found in *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). This inconsistent treatment of final judgments has led to disarray among the lower courts and threatens important federal judicial policies.

A. There is no valid justification to treat alleged errors in the determination of subject matter jurisdiction in a different manner than alleged errors in determinations of personal jurisdiction in the context of motions brought under Federal Rule 60(b)(4)

The Court's recent *United Student Aid Funds, Inc. v. Espinosa* decision, issued after the Eleventh Circuit's decision below, ruled that: "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." 176 L. Ed. 2d 158, 170 (2010). In identifying the type of jurisdictional error that qualifies as "void" under Federal Rule 60(b)(4), *Espinosa* quoted from lower court opinions referring to a lack of "even an 'arguable basis' for jurisdiction," or "a clear usurpation of power." *Id. citing to Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) and *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a

judgment void"). Ordinary errors or even obvious ones will not allow for the vacating of a judgment under Federal Rule 60(b)(4). *See, e.g.*, *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 377 (1940) ("If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities.").

The Eleventh Circuit's decision to affirm the trial court's vacating of its default judgment—which had been premised on a finding of personal jurisdiction—pursuant to Federal Rule 60(b)(4) is inconsistent with this Court's authority affirming that federal courts have jurisdiction to determine their jurisdiction, and that such determinations, even if demonstrably erroneous, are not thereby rendered "void." *E.g.*, *Espinosa*, 176 L. Ed. 2d at 170 ("A judgment is not void," for example, "simply because it is or may have been erroneous."); *Durfee v. Duke*, 375 U.S. 106, 113 (1963). "The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage District*, 308 U.S. at 377 *citing to Stoll v. Gottlieb*, 305 U.S. 165, 171, 172 (1938); *Kalb v. Feurstein*, 308 U.S. 433, 438 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *Evers v. Watson*, 156 U.S. 527, 533 (1895); *Des Moines Navigation & RR Co. v. Iowa Homestead Co.*, 123 U.S. 552, 557-58 (1887). These authorities do not draw a sharp distinction between subject matter and personal jurisdiction in this respect–both are part of the threshold jurisdictional authority of a federal district court. *See e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577-78 (1999).

Nonetheless the treatment of final judgments challenged by Federal Rule 60(b)(4) motions to vacate differs sharply depending on whether the motion seeks to overturn a judgment for lack of subject matter jurisdiction or personal jurisdiction, without any clearly enunciated justification. This unexplained anomaly harms the important federal policy of res judicata.

The decision below departs from *Espinosa*, and this Court's long line of precedent regarding a court's power to adjudge its own jurisdiction, by failing to treat the initial finding on personal jurisdiction by the trial court, even if erroneous, with the same res judicata force as a finding on subject matter jurisdiction by a court, even if erroneous. This problem arises from a widespread misinterpretation of a remark found in *Insurance Corp. of Ireland*, 456 U.S. at 706, and relied upon by the court below.

In *Insurance Corp. of Ireland*, this Court remarked in passing that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Id.* The source for that remark was this Court's own previous decision in *Baldwin v. Iowa State Traveling Men's Association*, where the Court commented that: "[i]f, in the absence of appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction." 283 U.S. 522, 525 (1931). As indicated by their context, these statements were dicta in their respective cases, both of

which actually involved what was once called the "special appearance", a procedural mechanism that was rendered obsolete in the federal system by the Federal Rules of Civil Procedure in 1938.

In *Baldwin*, the case actually involved a "special appearance" as permitted by the law of the forum state, which in that pre-Federal Rules era was applied in federal district courts under the Conformity Act. *Id.* at 523. The actual issue in the case was posed by the Court as one of collateral estoppel and due process: whether, having once litigated and lost the personal jurisdiction issue, the defendant was free to again challenge in another district. *Id.* at 525-26. The Court held that collateral estoppel precluded re-litigation of the issue. *Id.*

Thus, a now-obsolete procedural system—where a defendant, depending upon whether and on what terms a state law permitted a "special appearance", could be put to a stark choice between defending on the merits or preserving a challenge to personal jurisdiction, in the court of first instance, or waiting until an enforcement action or other collateral proceedings to contest—shaped the chain of dicta relied upon by the Eleventh Circuit. One of the procedural innovations of the Federal Rules was to eliminate that dilemma, by allowing a defendant to both defend on the merits and preserve an objection to personal jurisdiction in the district court of first instance, if presented in a timely and proper manner under Federal Rule 12. *See, e.g.*, Fed. R. Civ. P. 12(h). Another procedural innovation of the Federal Rules was Federal Rule 60(b). Prior to the codification of that rule, a post-judgment attack on the jurisdiction

of the original-instance court by definition was a "collateral proceeding"—i.e., a separate and distinct proceeding—and usually was conducted in a different court at the site of enforcement. In contrast, under Federal Rule 60(b), some challenges to the judgment may be presented to the original-instance court, essentially in a continuation of the original proceeding. Thus, the dicta from *Insurance Corp. of Ireland* that supports a challenge of a default judgment "on jurisdictional grounds in a collateral proceeding", *Baragona*, 594 F.3d at 854, seems out-of-place. KGL did not file a Federal Rule motion 60(b)(4) in a collateral proceeding, instead filing the motion in the rendering court.

In essence, the holding in *Insurance Corp. of Ireland* sprang from this archaic distinction. In that case, a foreign defendant had appeared solely to contest personal jurisdiction, but refused to comply with the trial court's subsequent discovery orders. The trial court sanctioned the defendant under Federal Rule 37 by asserting personal jurisdiction over the defendant. 456 U.S. at 705-07. On appeal, the defendant argued in effect that the discovery orders were "void" because personal jurisdiction had not yet been established by proof of "minimum contacts", and the defendant had not voluntarily submitted to the jurisdiction of the court. *Id.* at 701. This Court rejected that argument:

> Petitioners' basic submission is that to apply Rule 37(b)(2) to jurisdictional facts is to allow fiction to get the better of fact and that it is impermissible to use a fiction to establish judicial power, where, as a matter of fact, it

> does not exist. In our view, this represents a fundamental misunderstanding of the nature of personal jurisdiction.

Id. at 701. The Court reasoned that, because the district court had the inherent jurisdiction to determine its jurisdiction, reasonable procedural rules, if consistent with due process, were validly applied to assist the court in reaching its jurisdictional decision, whether or not the defendant voluntarily participated in the process. *Id.* at 702. Personal jurisdiction could be established by the violation of such a procedural rule: "[t]he expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights." *Id.* at 705.

The main question presented by the present case is whether and why the distinctions important to a procedural system rendered obsolete over 70 years ago by the passage of the Federal Civil Rules of Procedure should be kept alive in the very different and more closely integrated system created by the Federal Rules. There is precious little in the lower court decisions to explain why the anachronism should continue, when it obviously conflicts with the letter of the Federal Rules and the important judicial need for resolution and finality. The lack of rationale was recognized by Judge Newman's opinion in *"R" Best Products, Inc v. DiSapio*:

> It might seem anomalous that an appearing party is deemed to waive lack of personal jurisdiction by not properly asserting it in a timely motion or pleading, but a non-appearing party with notice may suffer a

> default judgment and later seek relief under Rule 60(b)(4). Apart from juridical fixation on the concept of voidness, the unstated rationale for the distinction is very likely that a non-appearing defendant, even with notice, should be spared the burden of defending in a distant forum and a plaintiff should be careful to join only those defendants as to whom personal jurisdiction can successfully be established in the original action.

540 F.3d 115, 123 (2d Cir. 2008). What seemed anomalous to Judge Newman is the result of the disparate treatment that has been accorded to judgments challenged by Federal Rule 60(b)(4) motion on the basis of their personal jurisdiction findings and those on the basis of their subject matter jurisdiction findings. This disparate treatment has spread across the lower courts as a result of the misinterpretation of *Insurance Corp. of Ireland* and requires the Court's definitive guidance.

The court of appeals here relied primarily on the *Insurance Corp. of Ireland* dictum, but also sought to distinguish this case from those where the alleged defect was in the service of process, as contrasted with what that court called the defendant's "amenability to jurisdiction," *Baragona*, 594 F.3d at 855, with specific reference to "the constitutional test of minimum contacts making it amenable to jurisdiction." *Id.* In this respect, the court of appeals' analysis is incorrect, as the territorial limits of effective service of process in a case like are given not by the Constitution directly, but rather by the provisions of Rule 4(k).

The court of appeals' analysis below also contradicts the ruling of *Insurance Corp. of Ireland*, which was precisely that "minimum contacts" was not the sine qua non for the assertion of personal jurisdiction, 456 U.S. at 701, as this court has held on several occasions. *E.g.*, *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 621, 622-26 (1990) (rejecting J. Brennan's use of a contacts test to satisfy due process in favor of a "fair play and substantial justice" standard). The obvious and substantial costs of adherence to the archaic *Baldwin* dicta are exemplified by this case. Here, KGL was fully informed of the action, and in fact was served with valid process, on multiple occasions. R-4, R-17. It knew that the district court was concerned with the issue of personal jurisdiction and that the district court intended to take evidence and argument from both sides as a result of the district court's order to serve KGL in Kuwait and its counsel in Washington, D.C. with Plaintiffs' memorandum on personal jurisdiction. R-24 at p.2. It was given specific notice and an opportunity to participate fully in that determination. Under the modern system created by the Federal Rules, KGL could have participated without any prejudice to its right to defend on the merits, and was assured appellate review of any adverse decision. And yet it chose to lurk in the shadows for over four years.

Only after judgment was finally entered did KGL come out of the shadows, and attack the judgment in the very same court to which it had been summoned years before. The underlying policy justifying finality is no better exemplified than here. Petitioners' son died in a tractor trailer accident determined by the Army to have been caused by KGL's negligence, Petitioners

commenced litigation, established a prima facie case of in personum jurisdiction and endured the personal rigors of the litigation including giving testimony during a damages hearing, only to discover that KGL had retained counsel the entire time whose apparent strategy was designed to cause Petitioners to expend their resources for years. This despite the fact that defendant intended to challenge what, if any judgment issued in the same forum that defendant assiduously ignored during the litigation despite district court ordered service.

The emotional burden borne by the family of the deceased serviceman was very high — the long years of litigation over their son's death in combination with the sudden entry of the defendant and the vacatur of the judgment is not a cost that should be ignored or encouraged. Why should this be permitted routinely, when the absent defendant has no good cause for non-participation? Note here that Judge Newman's suggested rationale for allowing a defaulting defendant to challenge a default judgment that the defendant had notice of, as discussed in *"R" Best Products, Inc.*, does not create a sensible defense of KGL's conduct: if it is "inconvenient" for a multinational firm like KGL to defend in the Northern District of Georgia, then presumably it is equally "inconvenient" for KGL to make its Federal Rule 60(b)(4) challenge to that same court and judge. It is not as if KGL's aversion to this forum "spared the burden of defending in a distant forum", which is a principal policy justification for allowing 60(b)(4) collateral attacks upon default judgments. *See, "R" Best Produce, Inc.*, 540 F.3d at 123. In this case,

allowing KGL to both have its cake and eat it too wasted years of time and substantial resources of both the parties and the court, to no discernible end.

From a constitutional point of view, the core concept that should command fairness, not power. The District Court ordered Petitioners to serve their memorandum of law regarding personal jurisdiction on KGL in Kuwait and its counsel in the United States and Petitioners' service upon KGL and its counsel explicitly provided KGL with notice of the Court's proceedings on personal jurisdiction and an opportunity to be heard on the vital issue of personal jurisdiction.

> The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without "due process of law." From these "cryptic and abstract words," Mullane, supra, at 313, we have determined that individuals whose property interests are at stake are entitled to "notice and an opportunity to be heard."

Dusenbery v. United States, 534 U.S. 161, 167 (2002) (internal citations omitted); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) *quoting Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). As this Court has held in a long line of cases, any person who is named as a party and served with process is bound by the courts' determinations, so long as the party has a full and fair opportunity to litigate, whether or not it

chooses to exercise that opportunity. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880 (2008); *Martin v. Wilks*, 490 U.S. 755, 761 (1989). The same principle has been applied to determinations of subject-matter jurisdiction, *Chicot County Drainage District*, 308 U.S. 371, and was again applied most recently in *Espinosa* to Federal Rule 60(b)(4) objections, both on subject-matter jurisdiction and to alleged defects in service, so long as such defects do not work a denial of procedural due process. 176 L. Ed. 2d at 169-70. There appears to be no good reason why the same principle should not be applied to shield determinations of personal jurisdiction from Federal Rule 60(b)(4) motions.

The decision below however ignored the fact that the district court scheduled an evidentiary hearing on personal jurisdiction, directed the Baragonas to serve their memorandum of law on this issue on both KGL and its counsel in the United States and found that the Baragonas had established a prima facie case that the court had personal jurisdiction. App. 50a. Thus the district court ruled that it had jurisdiction over the defendant. The district court's later decision to vacate this decision as a result of KGL's Federal Rule 60(b)(4) motion circumvents the policy of finality implicitly recognized by the Court's ruling in *Espinosa*, which relied upon a long line of decisions. *E.g.*, *Reed v. Allen*, 286 U.S. 191, 201 (1932) ("The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert."). "[R]esjudicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve

judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). This doctrine applies to protect default judgments as well. *E.g.*, *Morris v. Jones*, 329 U.S. 545, 551 (1947) *citing Riehle v. Margolies*, 279 U.S. 218, 225 (1929).

The Eleventh Circuit's decision also failed to take account of the well-founded point of law that *Espinosa* observed: "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." 176 L. Ed. 2d at 170 (internal citations omitted). Neither factor can be found in the *Baragona* case to support the voiding of the judgment pursuant to Federal Rule 60(b)(4). A jurisdictional error that would justify the voiding of a judgment is an "exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id. citing to Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) and *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) ("[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a judgment void"). In *Baragona*, the district court accepted evidence and determined that it could exercise personal jurisdiction under the state long-arm statute. *Baragona*, 594 F.3d at 854. Furthermore, the court below also ignored the service upon of KGL not only of the lawsuit itself, but notice of the personal jurisdiction hearing and Petitioner's memorandum of law regarding personal jurisdiction that the district court relied upon. Neither

a "total want of jurisdiction" nor a deprivation of notice or KGL's opportunity to be heard existed below, as required by *Espinosa* to justify the vacating of a judgment under Federal Rule 60(b)(4).

The unjustified disparate treatment accorded to personal jurisdiction findings in the context of motions brought under Federal Rule 60(b)(4) encourages defendants to sit on the sidelines and cause the plaintiff and the court to expend costly resources to adjudicate the issue of personal jurisdiction twice and threatens the doctrine of finality in the federal court system.

B. Review is warranted to resolve the disarray among the Circuit Courts as to the treatment of an erroneous judgment pursuant to Fed. Rule Civ. P. 60(b)(4)

The treatment of an erroneous judgment challenged by a motion brought under Federal Rule 60(b)(4) has been inconsistent among the lower courts. Numerous courts have recognized the distinction between an erroneous judgment and a void judgment when the defendant challenged the subject matter jurisdiction of the court, ruling that a judgment based upon an incorrect jurisdictional ruling, is not a legal nullity and not subject to vacatur under Fed. R. Civ. P. 60(b)(4) absent a "clear usurpation of power". *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003); *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000); *Raymark Industries, Inc. v. Lai*, 973 F.2d 1125 (3d Cir. 1992); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986); *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985); *Honneus v. Donovan*, 691 F.2d 1, 3 (1st Cir. 1982);

Kansas City S. R. Co. v. Great Lakes Carbon Corp., 624 F.2d 822, 825 n.4 (8th Cir. 1980) *cert. denied*, 449 U.S. 955, 66 L. Ed. 2d 220, 101 S. Ct. 363 (1980), *Lubben v. Selective Service System Local Board*, 453 F.2d 645, 649 (1st Cir. 1972).

Numerous lower courts however have also found that the judgment of a court lacking personal jurisdiction over a defendant is always void, as did the Eleventh Circuit below, and the district court therefore has a nondiscretionary duty to vacate the judgment. *Homer v. Jones-Bey*, 415 F.3d 748, 753 (7th Cir. 2005) (stating during the review of whether the district court denial of a Federal Motion 60(b) to set aside a default motion for insufficient service that "[i]f the district court had no jurisdiction over the movant, its judgment is void and it is an abuse of discretion to deny the movant's request to set aside the judgment under Rule 60(b)."); *Jackson v. FIE Corp.*, 302 F.3d 515, 518 (5th Cir. 2002) (vacating a default judgment despite its prior findings on personal jurisdiction, pursuant to Federal Rule 60(b)(4)); *Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998) ("the First Circuit has held that the district court does not have discretion to deny a Rule 60(b)(4) motion if the challenged judgment was void for lack of personal jurisdiction."); *Printed Media Servs. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993) (vacating default judgment as void despite determination by district court that it could assert personal jurisdiction over the defendant); *Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14, 19 (3d Cir. 1985); *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980). Not a single one of these cases however involve

the fact pattern of this case, where the district court effectively represented the defendant in a *sua sponte* personal jurisdiction adjudication, and required the plaintiff to not only make a prima facie case of personal jurisdiction but to also serve the defendant with plaintiffs' personal jurisdiction memorandum well in advance of the determination on that issue.

There are decisions however that conflict with the rigid adherence to the *Insurance Corp. of Ireland* dicta to allow a collateral attack at any time upon a default judgment for an allegedly erroneous assertion of personal jurisdiction. The Third Circuit in *In re Universal Display & Sign Co.*, shielded a default judgment with an arguably erroneous personal jurisdiction finding from a Federal Rule 60(b)(4) challenge. 541 F.2d 142, 144 (3d Cir. 1976). The Court found that the judgment was not void and was only correctable by the court of appeals. *Id.; see also Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 907 (6th Cir. 2006) ("only judgments that show a jurisdictional defect on the face of the record are classified as void judgments."). Additionally, several circuits have ruled that a party with notice of a proceeding can not later file a Federal Rule 60(b)(4) motion to vacate a default judgment based upon defective service of process. *Sanderford v. Prudential Ins. Co.*, 902 F.2d 897, 899 (11th Cir. 1990); *Wells v. Rockefeller*, 728 F.2d 209, 214 (3d Cir. 1984). There is no reason to view the defective service of process defense on a lesser footing than the

defense of personal jurisdiction, as the Eleventh Circuit did below:

> a defendant that ignores faulty service of process might be found to have waived one component of personal jurisdiction: the defense of improper service of process. They do not, however, hold that a defendant waives the personal jurisdiction defense when it receives notice but does not meet the constitutional test of minimum contacts making it amenable to jurisdiction.

Baragona, 594 F.3d at 855. The waiver of both defenses is governed by Federal Rule 12(h) however and a defendant may waive the right to raise either under the exact same circumstances.

Judge Newman of the Second Circuit recognized the cognitive dissonance surrounding the treatment of default judgments when confronted with a challenge to the district court's personal jurisdiction: "[i]t might seem anomalous that an appearing party is deemed to waive lack of personal jurisdiction by not properly asserting it in a timely motion or pleading, but a non-appearing party with notice may suffer a default judgment and later seek relief under Rule 60(b)(4)." *"R" Best Products, Inc v. DiSapio*, 540 F.3d 115, 123 (2d Cir. 2008). The confusion between the line of decisions supporting *Espinosa* and distinction between void and erroneous decisions, often in the context of subject matter jurisdiction findings, and the line of cases finding that a prior judgment finding personal jurisdiction *must be* vacated as a legal nullity requires this Court's guidance.

II. Federal Rule 60(b)(4) does not create an exception to the waiver rule found in Federal Rule 12(h)

In order to deny Petitioners' appeal below, the Eleventh Circuit distinguished its own precedent *Sanderford*, which found that a defendant's:

> failure to assert the defense of insufficiency of process prior to the entry of final default judgment, at a time when he had actual notice of the action and of the court's entry of final default judgment constitutes waiver of the defense of insufficiency of process.

902 F.2d at 899. In this case, Petitioner argued below that *Sanderford* supported their argument that the notice provided to KGL, of the lawsuit and the subsequent personal jurisdiction adjudication, and KGL's opportunity to be heard created a waiver of KGL's ability to raise a personal jurisdiction defense. The Eleventh Circuit found that the usage of the formulation that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding", *Baragona*, 594 F.3d at 854 *quoting Insurance Corp. of Ireland*, 456 U.S. at 706, was justified "where the court must determine whether the constitutional requirements of minimum contacts are satisfied." *Id. citing to Foster v. Arletty 3 S.A.R.L.*, 278 F.3d 409, 413 (4th Cir. 2002). The application of this quotation in the decision below can not be squared with the language of Federal Rules 12(h) and 60(b)(4). If the

word "party" in both rules means the same thing, which by logic it should, then how can KGL have complied with Federal Rule 12(h)?

Federal Rule 12(h)(1) provides that the defense of personal jurisdiction may be waived by either failing to raise the defense while raising other defenses "under this rule", Fed. R. Civ. P. 12(h)(1)(A), by failing to make the defense in a motion "under this rule", Fed. R. Civ. P. 12(h)(1)(A)(i) or by failing to "include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course." Fed. R. Civ. P. 12(h)(1)(A)(ii). KGL did not make a motion under Federal Rule 12 or file a responsive pleading. Under Federal Rule 12(h), then, KGL waived its right to raise the defense of personal jurisdiction.

Insurance Corp. of Ireland held that a defendant could be subjected to personal jurisdiction through the violation of a federal procedural rule without either the satisfaction of minimum contacts or consent, by recognizing that a federal court has the power to determine its own jurisdiction, including personal jurisdiction. 456 U.S. at 706. A court might establish personal jurisdiction over a defendant through the classic "minimum contacts test", or via the conduct of a defendant whether by waiving their right to assert the personal jurisdiction defense under Fed. R. Civ. P. 12(h), *id.* at 705, or as a punishment for the violation of a jurisdictional discovery order. *Id.* at 705-07. This holding flows from the observation that:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from

> the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

Id. at 702. Thus the conduct of a defendant may constitute a waiver of the defense, e.g. by appearing without raising the defense, *id.* at 703-04, and the court therefore may enter a judgment against the defendant irrespective of the satisfaction of the minimum contacts test. Minimum contacts therefore can not be called a constitutional requirement prior to the assertion of personal jurisdiction over a defendant, despite the Eleventh Circuit Reliance upon the formulation below. *Baragona*, 594 F.3d at 854-55.

The *Insurance Corp. of Ireland* Court also found that a defendant could be subjected to personal jurisdiction without their consent. In *Insurance Corp. of Ireland*, the defendant appeared to contest personal jurisdiction but then violated a discovery order, which resulted in the district court subjecting personal jurisdiction over the defendant as a Fed. R. Civ. P. 37 sanction. 456 U.S. at 699. The *Insurance Corp. of Ireland* Court equated the creation of personal jurisdiction through the use of a procedural rule such as Federal Rule 12(h), with the use of a discovery sanction under Federal Rule 37. *Id.* at 704-05. The

implementation of Federal Procedural Rules can create personal jurisdiction:

> As demonstrated above, the manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straightforward factfinding. A particular rule may offend the due process standard of *Hammond Packing*, but the mere use of procedural rules does not in itself violate the defendant's due process rights.

Id. at 707. *Insurance Corp. of Ireland* therefore stands for the proposition that KGL's conduct in the context of the Federal Rules of Civil Procedure may create personal jurisdiction without KGL's consent or the satisfaction of the minimum contacts test.

CONCLUSION

Due to the pressing need to dispel the confusion among the lower courts as to the Court's holding in *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982) and to clarify the distinction between erroneous and void judgments in the context of Fed. R. Civ. P. 60(b)(4), as recently stated in *United Student Aid Funds, Inc. v. Espinosa*, 176 L. Ed. 2d 158, 169-70 (2010), and the importance of the federal judicial policies threatened, the Court should grant plenary review and set the case for briefing and argument.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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